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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/509,271	03/28/2005	Bernard Cleenewerck	18234	2289
7590 04/24/2008				
Leopold Presser Scully Scott Murphy & Presser Suite 300 400 Garden City Plaza Garden City, NY 11530		EXAMINER PADEN, CAROLYN A		
		ART UNIT 1794		PAPER NUMBER
		MAIL DATE 04/24/2008		DELIVERY MODE PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/509,271

Applicant(s)

CLEENEWERCK ET AL.

Examiner

Carolyn A. Paden

Art Unit

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 11 April 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-85 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-85 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SF/ICE)
Paper No(s)/Mail Date 9-27-04
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

Claims 30, 43 & 55-57 are- rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 30 is in the passive voice and it is unclear from the claim as to what specific process steps are intended. An amendment to the claims utilizing the active voice would overcome the rejection.

The term "difference in SFC...more than" in claims 55-57 is a relative term which renders the claim indefinite. The phrase "difference...more than" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention.

It is also unclear as to what is meant by SFC. An amendment to the claims defining this abbreviation would overcome the rejection [eg. SFC (solid fat content)].

A broad range or limitation together with a narrow range or limitation that falls within the broad range or limitation (in the same claim) is considered indefinite, since the resulting claim does not clearly set forth the metes and bounds of the patent protection desired. See MPEP §

2173.05(c). Note the explanation given by the Board of Patent Appeals and Interferences in *Ex parte Wu*, 10 USPQ2d 2031, 2033 (Bd. Pat. App. & Inter. 1989), as to where broad language is followed by "such as" and then narrow language. The Board stated that this can render a claim indefinite by raising a question or doubt as to whether the feature introduced by such language is (a) merely exemplary of the remainder of the claim, and therefore not required, or (b) a required feature of the claims. Note also, for example, the decisions of *Ex parte Steigewald*, 131 USPQ 74 (Bd. App. 1961); *Ex parte Hall*, 83 USPQ 38 (Bd. App. 1948); and *Ex parte Hasche*, 86 USPQ 481 (Bd. App. 1949). In the present instance, claim 43 recites the broad recitation of the iodine value, and the claim also recites the preferable range which is the narrower statement of the range/limitation.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 30-44, 46-57 and 59-85 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kawada (3,686,240) as further evidenced by

applicant's admission in the specification at page 10, lines 3-21 and Defense article taken together.

Kawada discloses making cacao butter substitute from palm oil. In example 2 palm middle melting fraction is hydrogenated to an iodine value of 35.9 and a trans acid content of 1%. The hydrogenation process utilized copper-chromium-manganese oxide catalyst at 200C. Applicant admits that his starting glyceride is palm mid-fraction at page 10, lines 3-21 of the specification. But further evidence of the composition of palm mid fraction is provided by Defense in Table VIII. The claims appear to differ from Kawada as further evidenced by Defense in the recitation of the extent of C18-0 in the hydrogenated product. The starting materials are the same in Kawada and the claims and the trans acids are the same and the process is the same. One of ordinary skill in the art would expect the extent of C18-0 to also be the same as a result of the process of Kawada. In this case the first fat and second fat are the same fat. Kawada teaches that his product has use as a cacao butter substitute. It is appreciated that the particular use of the fat in all of the confectionary products of the claims is not mentioned but cacao butter is a known component in confectionaries. To utilize a cacao butter substitute in place of cacao butter would have

been an obvious way to provide an alternate confectionery product at a potentially lower cost to the consumer.

Claims 45 and 58 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kawada as further evidenced by applicants' admission and Defense as applied to claims 30-44, 46-57 and 59-85 above, and further in view of any of Higgins, Cahen or Harrod.

The claims appear to differ from Kawada as further evidenced by Defense in the recitation of the use of a Ni or nickel containing catalyst. Each of Higgins, Cahen and Harrod provide for nickel catalysts for fats that produce low levels of trans acids. It would have been obvious at the time of applicants' invention to utilize the nickel catalysts of Higgins, Cahen or Harrod as an obvious substitute for the catalysts of Kawada in order to provide a low trans hydrogenated fat. It is appreciated that "non-temper" fat is not mentioned but one of ordinary skill in the art would not expect the hydrogenated fat of Kawada to be a tempering fat. Assuming arguendo that this is wrong, hydrogenating combinations of oils is well known in the art. One would expect that some of these fats would be non-tempering fats.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano, can be reached by dialing 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Carolyn Paden/

Primary Examiner 1794

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